

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JONATHAN SWINTON,

Defendant-Appellant.

UNPUBLISHED

August 14, 2001

No. 223032

Tuscola Circuit Court

LC No. 97-007102-FC

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant, who pleaded guilty to second-degree murder, MCL 750.317, and was sentenced to twenty-five to sixty years' imprisonment, appeals by leave granted from an order denying his motion to set aside his guilty plea. We affirm.

Defendant argues that the trial court erred in denying his motion to set aside the plea because his court-appointed attorney had a conflict of interest. "When first made after sentencing, a motion to withdraw a guilty plea is addressed to the sound discretion of the trial court, and the trial court's decision will not be disturbed unless there is a clear abuse of discretion resulting in a miscarriage of justice." *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997).

Defendant was represented during certain stages of the proceedings in this case by attorney Amy Gierhart, from the law firm of Abbey & Abbey. During Gierhart's representation of defendant, Abbey & Abbey also represented Tuscola County in a civil action seeking to recoup medical expenses incurred by defendant as a result of his arrest for the instant crime. Defendant allegedly did not find out about the possible conflict of interest until after his plea and sentence. After defendant moved to set aside his plea, the trial court ruled that because Gierhart's representation had not been affected by her firm's representation of Tuscola County in the collection matter, defendant was not entitled to relief.

We cannot say that the trial court abused its discretion or caused a miscarriage of justice in making this ruling. See *id.* As stated in *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980), "in order to demonstrate that a conflict of interest has violated his Sixth Amendment rights, a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's

performance.” See also *People v Rhinehart*, 149 Mich App 172, 176; 385 NW2d 640 (1986) (a defendant alleging a conflict of interest requiring reversal must show that the conflict affected his attorney’s representation); *People v Kyllonen*, 80 Mich App 327, 330; 263 NW2d 55 (1977) (automatic reversal not required even though the defendant’s appointed counsel prosecuted misdemeanor crimes in the same jurisdiction and had worked closely in the past with the investigating officers and complaining witnesses), and *People v Adams*, 76 Mich App 384, 385-386; 256 NW2d 605 (1977) (automatic reversal not required even though the defendant’s attorney simultaneously represented a police officers’ association, two members of which testified at trial).¹

The above cases show that contrary to defendant’s contention, no *per se* prejudice requiring reversal existed in this case, despite Abbey & Abbey’s dual representation. Accordingly, to obtain his desired relief, defendant had to show that the collection matter somehow affected Gierhart’s representation. He failed to do so. Indeed, defendant points to nothing in the record demonstrating as much. Gierhart specifically denied that the collection matter affected her representation. The trial court characterized her representation as “without flaw.” The Abbey & Abbey lawyer handling the collection case stated that he saw no conflict in the dual representation because he had no contact with defendant but instead focused on obtaining money from defendant’s insurance company. Accordingly, because defendant did not show that Gierhart’s representation was affected by the collection matter, the trial court did not err in denying defendant’s motion to withdraw his guilty plea.

Even though we find no error requiring reversal, we nonetheless do not condone the dual representation by Abbey & Abbey in this case; the firm made a serious error in judgment and should heretofore strive to heed the Michigan Rules of Professional Responsibility. See generally *In re Osborne*, 459 Mich 360, 366-369; 589 NW2d 763 (1999) (in which the Court, although affirming the judgment against the respondent, nevertheless criticized her attorney for violating the Michigan Rules of Professional Conduct).

Defendant additionally argues that aside from the alleged conflict of interest, a vacation of his guilty plea was required because of certain tactical errors made by Gierhart during her representation. However, we granted defendant leave to appeal on the sole question of whether he was denied the effective assistance of counsel because his “attorney represented him in this criminal matter and her law firm undertook a civil action against the defendant for the same facts and circumstances arising from the same transaction.” Therefore, we need not review defendant’s additional arguments. See *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 558 n 16; 475 NW2d 304 (1991), and *Michigan Education Association Political Action Committee v Secretary of State*, 241 Mich App 432, 443 n 4; 616 NW2d 234 (2000). Even if we *were* to review them, we would find no basis for reversal. Indeed, defendant did not sustain his burden of proving that Gierhart’s performance fell below an objective standard of reasonableness

¹ See also *In re Osborne*, 459 Mich 360, 367-369; 589 NW2d 763 (1999), and *In re Osborne (On Remand, After Remand)*, 237 Mich App 597, 603; 603 NW2d 824 (1999) (indicating, in the context of child protective proceedings, that prejudice must have resulted from a conflict of interest in order for the conflict to require reversal).

and likely affected the outcome of the case. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter